No. 20894

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HONOLULU STAR BULLETIN, INC., AND ADVERTISER PUBLISHING CO., LTD., d/b/a HAWAII NEWSPAPER OPERATORS, RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),[1] for enforcement of its order (R. 11-

[1] The pertinent statutory provisions are reprinted in the Appendix, *infra*, pp. 38-43.

25, 30-31)[2] issued on June 29, 1965, against respondent. The Board's decision and order are reported at 153 NLRB No. 83. This Court has jurisdiction of the proceedings, the unfair labor practices having occurred within this judicial circuit. No jurisdictional issue is presented.

STATEMENT OF THE CASE

I. The Board's Findings of Fact

The Board found that the Company failed to bargain in good faith with the Union[3] in violation of Section 8(a)(5) and (1) of the Act. The facts underlying the Board's conclusions follow.

A. *Background*

1. *Bonus plans promulgated when Star Bulletin and Advertiser operated as independent entities*

Prior to June 1, 1962, the Honolulu Star Bulletin and Honolulu Advertiser functioned as independent entities. The former was published as an afternoon daily newspaper and the latter as a morning daily (R. 12; Tr. 22-23). Each paper separately negotiated

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[2] References designated "R." are to Volume I of the record as reproduced pursuant to Rule 10 of this Court. References designated "Tr." are to the reporter's transcript of the testimony as reproduced in Volume II of the record. References designated "G.C. Exh." or "Resp. Exh." are to exhibits of the General Counsel and respondent, respectively. Whenever in a series of references a semicolon appears, those references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

[3] Hawaii Newspaper Guild, Local 117, AFL-CIO.

a series of collective bargaining agreements with the Union covering, *inter alia*, the advertising department employees of each paper (R. 13; Res. Exhs. 1, 4). With respect to compensation, the Union's Star-Bulletin and Advertiser contracts had both provided, among other things, for minimum weekly salary schedules. These schedules, however, were coupled with provisions confirming each publisher's right to pay more than the contractual minimums. Neither the Star Bulletin nor Advertiser contract expressly incorporated bonuses into the employees' wage structure (R. 13; Res. Exh 1 (Clause 26, Res. Exh. 4 (Clause 12)). For some years, however, the advertising department personnel of both newspapers were paid substantial incentive bonuses. These payments were made pursuant to numerous plans instituted by management. Thus, from 1957 to June 1962, the Advertiser had continuously maintained in effect a so-called "quarterly" bonus plan which accounted for a significant portion of the regular compensation received by its advertising salesmen.[4] Throughout this same period, Star Bulletin salesmen received comparable bonuses pursuant to a series of plans promulgated for specific business purposes. Each plan was discontinued when management considered the plan's purpose had been achieved (R. 13; Tr. 20, 24, 32-33, 35-37, 67-69, 93-95, 102).

[4] Union President Roy Kruse testified without contradiction that the Advertiser's quarterly bonus plan generally accounted for 10 percent of the salesmen's monthly wages (Tr. 24).

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2. *The Star Bulletin and Advertiser consolidation*

Effective June 1, 1962, the Star Bulletin and Advertiser combined their production facilities and formed a new legal entity—the Hawaii Newspaper Operators (HNO)[5]—for the purpose of publishing, printing, circulating, and selling both newspapers.[6] The newly combined operation was directed by the Hawaii Newspaper Agency, a business entity comprised of three managerial employees (R. 13; Tr. 22-23, 111-112).

When the consolidation occurred, the Star Bulletin and Advertiser had separate contracts in effect with the Union which were both due to terminate on March 31, 1963. To resolve any controversies which might arise prior to the negotiation of a new contract for the combined operation, the Company and the Union entered into an "interim" agreement on July 13, 1962, governing the conditions of employment, *inter alia*, of the Company's 40-50 advertising department workers. Essentially, the agreement provided that the provisions of the existing Star Bulletin contract would be "deemed incorporated into a separate agreement" to be "continued in full force and effect," presumably for the remainder of the contract's stated term (R. 13; Tr. 93-95, 97, 14; Resp. Exhs. 3, 4). According to the undisputed testimony of Assistant

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[5] Hereafter referred to as the Company or Respondent.

[6] HNO continued to publish the Advertiser as a morning newspaper and the Star Bulletin as an evening paper. Additionally, a joint Sunday morning publication was printed (R. 13; Tr. 22-23).

General Manager Brandt, there was no discussion relating to bonus payments in the negotiation sessions which produced the "interim" agreement (R. 19; Tr. 106).

In the meantime, immediately after the June 1 consolidation, the Company discontinued the longstanding "quarterly" bonus plan which had been in effect at Advertiser and the so-called "Sunday bonus plan" which Star Bulletin had previously promulgated for its advertising salesmen. To allay the employees' fears that bonuses would no longer be granted, the Company posted and distributed notices promising that it would reinstitute incentive bonus plans which would yield sums of money comparable to the amounts received under the prior plans (R. 14; Tr. 28, 37-38).

On September 19, 1962, Carl Barrea, respondent's advertising sales director, promulgated a Saturday-Monday bonus plan whereby the employees would receive payment for advertising lineage sold for the Saturday Star Bulletin, Monday Advertiser, or both. Union President Kruse thereafter protested to retail advertising manager Nelson at the weekly meetings of his department that this plan was not yielding adequate bonuses and that it should have been made retroactive to June 1, 1962. Subsequently, in February 1963, the Company promulgated "Proposed Bonus Plan #1". Pursuant to that plan, the advertising salesmen were divided into two teams which were declared eligible to receive monthly payments whenever their total "lineage performance" surpassed a specified quota. The employees were apprised that the purpose of this plan was to stimulate the Company's sales

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effort and further that it "may be revised or discontinued at any time even though the present objective is to make this effective for the first 4 months of 1963" (Resp. Exh 2). After the plans became operative, the Company paid bonuses in the form of supplementary weekly or monthly paychecks. Employee Kruse estimated that as a result of the two mentioned plans he received bonuses which on the average totaled 5-7 percent of his entire earnings [7] (R. 14; Tr. 11-14, 31-33, G.C. Exh. 3; Resp. Exh. 2).

Under the terms of the "interim agreement" the Company's contract with the Union terminated on March 31, 1963. Initial negotiations for a new contract were unsuccessful, and the Union called a strike on June 22, 1963. It lasted until August 2 (R. 15; Tr. 108). Three days later, on August 5, the Company notified its advertising staff in a memorandum from Mr. Nelson that it had discontinued both the "Saturday-Monday" and "monthly team" bonus plans. The memorandum concluded, however, with a promise that "[n]ew plans will be presented as soon as possible" (R. 15; Tr. 15, G.C. Exh. 4). In fact, no new plans were presented. Accordingly, beginning about 1 week after this memorandum was posted, Union President Kruse repeatedly queried Nelson and Barrea during regular morning meetings of the sales staff about the status of new bonus plans. He was advised, in essence, that no new plans had yet been approved

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[7] Kruse also testified without contradiction that for the month of May 1963, he received approximately $60 in bonus payments pursuant to the two mentioned plans (R. 14; Tr. 14).

by management. During one morning meeting, Nelson suggested that the staff form their own committee to prepare some "ideas" for presentation. Kruse and four other staff members who also belonged to the Union volunteered to serve on that committee. Their efforts culminated in two proposed plans which were presented to management during the September 25 sales meeting. Nelson declared that they looked "pretty good" but would have to be submitted to Frederick Brandt, assistant general manager, for approval. Such approval was not forthcoming, however, and Kruse thereupon queried Barrea and Nelson at least once or twice a week as to the status of the committee proposals. He was advised repeatedly that "nothing had been okayed yet" but that the entire subject of bonus plans was still being studied (R. 15; Tr. 16-18).[8]

3. *The Company and Union execute a new contract*

On October 31, 1963, while the bonus question was still in dispute, the Company and Union signed a new contract effective from October 1, 1963, until May 31, 1966, which covered, *inter alia*, all respondent's advertising department employees.[9] Section 12 of the

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[8] The Company has conceded that Brandt, Barrea and Nelson are supervisors within the meaning of the Act (R. 9).

[9] Pursuant to the contract, the bargaining unit relevant here was defined as follows (R. 15; G.C. Exh. 2):

> All advertising department employees, excluding confidential secretaries, temporary employees, guards, professional employees, employees covered by other collective bargaining agreements, the advertising editor, advertis-

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new contract, dealing with minimum salaries, guaranteed that the Company would not reduce the present salaries of employees covered thereby. The term "present salary" was defined as the straight time weekly salary being paid for a workweek of 40 hours, exclusive of "payments for overtime or bonus or any other extra payments." [10] This provision was a precise replica of a provision in the Union's 1961 contract with the Star Bulletin which, as explained above, was later incorporated into the 1962 "interim agreement" and remained in effect until March 31, 1963 (R. 15-16; G.C. Exh. 2, Sec. 12(a); Res. Exh. 4, Sec. 12(a)).[11] In the negotiations which culminated in Section 12 of the current contract, the parties once again did not discuss bonus plans or the Company's

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ing sales director, retail advertising manager, general advertising manager, classified advertising manager, advertising production manager, assistant retail advertising manager, assistant classified advertising manager, advertising commission salesmen, classified telephone room supervisor, promotion manager and all supervisors as defined by the Act.

[10] The contract did not contain a general managerial prerogative clause as such. Nor did it contain any waiver clause whereby the parties forego their rights to bargain with respect to any subject not covered in the contract.

[11] The Union's 1961 contract with the Advertiser had contained a comparable prohibition against reductions in the present salary of covered workers. However, the only exclusions from the contractual term "present salary" were "payments for overtime or any other extra payments"; unlike the Star Bulletin contract, this provision did not specifically exclude bonuses from those salary payments which management had committed itself to maintain in effect. (R. 16; Res. Exh. 1, Sec 26(B)).

prior practice of promulgating and terminating such plans unilaterally. Nor did the parties discuss the significance, if any, of their adopting the "present salary" provision of the Star Bulletin contract rather than the comparable provision of the Advertiser contract (R. 16, 19; Tr. 15-16, 62, 78-79, 100-101, 105-106).

B. *The refusal to bargain*

On January 2, 1964, Union President Kruse accompanied by Thomas Lum, the Union's administrative officer, called upon Assistant General Manager Brandt to question the Company's continued failure to establish new bonus plans for the advertising department salesmen. Brandt replied initially that to be feasible the plan would have to include all of the Company's workers, "including the business office staff, janitors and what-not." The Union's spokesmen responded that they sought only the Company's commitment to reinstate bonus plans like those previously available to advertising personnel (R. 16; Tr. 19-20, 79-80). To this request, Brandt responded that (R. 16; Tr. 20):

> . . . he didn't feel that the bonus plan was a negotiable item, that he felt that it was his company's prerogative to . . . put them in or take them out whenever they felt like it, and he didn't feel it was part of the wage structure.

Brandt further explained that the contract covered "everything that was negotiable" and that bonuses were therefore not a negotiable item since they were not covered in the contract (R. 16-17; Tr. 79-80).

On March 17, Brandt again told Kruse and Lum that the subject of bonus plans was not negotiable. Pursuant to the direction of the bargaining unit members, Lum then wrote to Brandt requesting that a date be set to negotiate a new bonus plan with the Union. On or about March 25, Brandt orally advised Lum that his position remained unchanged and that the Union representatives could pursue whatever course of action they desired. The instant unfair labor practice charge was filed 1 week later (R. 17; Tr. 20-21, 25-26, 80-84, G.C. Exh. 1(a)).

II. The Board's Conclusions and Order

Upon the foregoing facts, the Board found, in agreement with the Trial Examiner, that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain in good faith with the Union with respect to the formulation and reinstitution of incentive bonus plans for advertising department employees (R. 30-31).[12] The Board's order requires the Company to cease and desist from refusing to bargain in good faith with the Union, or from in any like or related manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act. Affirmatively, the order requires the Company to bargain, upon request, with respect to the formulation and reinstitution of incen-

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[12] The Board, however, did not adopt the Trial Examiner's conclusion (R. 21) that respondent refused to bargain about a bonus as of October 1, 1963. The Board found that the refusal to bargain initially occurred on January 2, 1964, and continued thereafter (R. 30).

tive bonus plans for its employees, and to post appropriate notices (R. 23-24).

ARGUMENT

I. The Board's Finding That Respondent Refused to Bargain, in Violation of Section 8(a)(5) and (1) of the Act, is Supported by Substantial Evidence on the Record as a Whole

A. *Introduction*

The duty to bargain collectively, as defined in Section 8(a)(5), 8(b)(3) and 8(d) of the Act, requires, *inter alia*, that both parties upon request meet "at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . ." Before the Board, respondent did not contest the fact that its longstanding incentive bonus payments constitute "wages" and thus a mandatory subject of bargaining within the meaning of the Act. See, for example, *Singer Manufacturing Corp.* v. *N.L.R.B.*, 119 F. 2d 131, 136 (C.A. 7), cert. denied, 313 U.S. 595, enforcing 24 NLRB 444, 459, 460, 470; *N.L.R.B.* v. *Niles-Bement-Pond Company*, 199 F. 2d 713-714 (C.A. 2), enforcing 97 NLRB 165; *N.L.R.B.* v. *Electric Steam Radiator Corp.*, 321 F. 2d 733, 737 (C.A. 7), enforcing 136 NLRB 923; *General Telephone Co.* v. *N.L.R.B.*, 337 F. 2d 452, 453-454 (C.A. 5), enforcing in relevant part, 144 NLRB 311. On January 2, 1964, and March 17, 1964, the Union requested that respondent bargain with it concerning the promulgation of bonus plans and respondent admittedly refused to do so. Respondent asserts,

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nonetheless, that it has not violated the Act; the primary thrust of its defense before the Board was that the Union waived its statutory right to bargain with respect to bonus plans, thereby rendering respondent's conduct lawful.[13] But the Board ruled that a waiver of the statutory right to bargain must clearly and unmistakably be shown to have been consciously yielded, and that no such showing was made on this record. We show first that the Board's doctrine governing waiver of the statutory right to bargain is sound.

B. *The Board's waiver doctrine and its rationale*

The Board has consistently taken the position, with court approval, that while a party may waive its right to bargain about terms and conditions of employment such waiver must be conscious, clear, and unmistakable; the waiver of a right so basic and traditional as the statutory right to bargain will not be lightly inferred.[14] See, for example, *Pacific Coast*

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[13] In addition, respondent contended that the Board erred in asserting jurisdiction over the subject matter of this action instead of compelling the Union to exhaust its remedies pursuant to the grievance-arbitration machinery set forth in the collective bargaining agreement between the parties. This contention is discussed *infra*, pp. 28-36.

[14] The aforementioned settled rule limiting waivers of the statutory right to bargain comports with established principles governing waiver of rights conferred by the Act. For example, the Supreme Court held in *N.L.R.B.* v. *Lion Oil Company*, 352 U.S. 282, 293 "where there has been no express waiver of the right to strike, a waiver of the right during . . . . [the contract] period is not to be inferred." Accord *Mastro Plastic Corp.* v. *N.L.R.B.*, 350 U.S. 270, 283. See also,

Ass'n of Pulp & Paper Mfrs. v. *N.L.R.B.*, 304 F. 2d 760, 763, 765 (C.A. 9); *N.L.R.B.* v. *Perkins Machine Co.*, 326 F. 2d 488; *Timken Roller Bearing Co.* v. *N.L.R.B.*, 325 F. 2d 746 (C.A. 6), cert. denied, 376 U.S. 971; *N.L.R.B.* v. *Otis Elevator Co.*, 208 F. 2d 176, 177, 179 (concurring opinion) (C.A. 2); *N.L.R.B.* v. *Item Co.*, 220 F. 2d 956 (C.A. 5), cert. denied, 350 U.S. 836; *N.L.R.B.* v. *Taylor*, 338 F. 2d 1003 (C.A. 5); *N.L.R.B.* v. *J. H. Allison & Co.*, 165 F. 2d 766, 768 (C.A. 6), cert. denied, 355 U.S. 814. As the Board stated in this case (R. 18), quoting from its earlier decision in *Proctor Manufacturing Co.*, 131 NLRB 1166 at 1169:

> The Board's rule, applicable to negotiations during the contract term with respect to a subject which has been discussed in precontract negotiations but which has not been specifically covered in the resulting contract, is that the employer violates Section 8(a)(5) if, during the contract term, he refuses to bargain or takes unilateral action with respect to the particular subject, unless it can be said from an evaluation of the prior negotiations that the matter was "fully discussed" or "consciously explored" and that the Union "consciously yielded" or clearly and unmistakably waived its interest in the matter.

N.L.R.B. v. *Washington-Oregon Shingle Weavers Ass'n.*, 211 F. 2d 149, 153 (C.A. 9), citing with approval *Tide Water Associated Oil Co.*, 85 NLRB 1096, 1098.

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Accord: *Inland Steel Company*, 77 NLRB 1, 14-15; *TideWater Associated Oil Company*, 85 NLRB 1096, 1098; *International News Service, Div. of the Hearst Corp.*, 113 NLRB 1067, 1070; *Press Company, Inc.*, 121 NLRB 976-980; *Beacon Piece Dyeing and Finishing Co., Inc.*, 121 NLRB 953, 956-961; *Servette, Inc.*, 133 NLRB 132, 136-137; *Toffenetti Restaurant Company, Inc.*, 136 NLRB 1156, 1167-1168; *Adams Dairy Co.*, 147 NLRB 1410, 1412.

The rationale underlying the Boards' strict requirements for waiver has been expressed at length in numerous decisions cited above. First, this rule gives effect to the basic objective of the statute by encouraging the practice and procedure of collective bargaining as a means of eliminating industrial strife. Section 1 of the Act.[15] By requiring bargaining on any bargainable issue which was not expressly resolved in the contract, the Board's rule prevents strikes—authorized or unauthorized—by avoiding the accumulation of resentment, dissatisfaction and frustration which the preclusion of bargaining might well arouse in the employees. Cf. *Pacific Coast Ass'n of Pulp & Paper Mfrs.* v. *N.L.R.B.*, 304 F. 2d 760, 764 (C.A. 9).[16] That this is a reality of industrial life

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[15] Section 1 provides, in relevant part, "[i]t is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate those obstructions when they have occurred by encouraging the practice and procedure of collective bargaining . . . ."

[16] In *Jacobs Manufacturing Co.*, 94 NLRB 1214, 1217-1218, enforced, 196 F. 2d 680 (C.A. 2), the Board observed that to

was long ago confirmed by leading authorities in the field of labor relations.[17] Further, by assuring the parties the right to postpone discussion on matters which are only of contingent significance at the time of negotiation but which may thereafter ripen into prominence, the Board eases the path of parties negotiating agreements.

If waiver of the right to bargain could be inferred where it was not clearly intended, a party would hesitate to raise issues on which agreement might not be obtained lest it be foreclosed from discussing those topics throughout the entire contract period. In the Board's view, such a doctrine, at the very least, would stifle rather than encourage the free exchange of ideas and diminish the mutual trust between the parties which lies at the heart of a successful bargaining relationship. Management would hesitate to initiate discussions on possible innovations in the manufacturing process, fearing that, if agreement is not reached in the negotiations, management would be precluded from later introducing that innovation, no matter how desirable or necessary, because it had "waived" its right to bargain on the matter. See

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"permit a party to a bargaining contract to avoid discussion when it was sought on subject matters not contained in the contract—would serve, at its best, only to dissipate whatever . . . good will . . . has been engendered by the previous bargaining negotiations that led to the execution of a bargaining contract; . . . ."

[17] See, for example, Randle, *Collective Bargaining Principles and Practices* (Houghton Mifflin Co., 1951), pp. 91-92; Hill and Hook, *Management at the Bargaining Table* (McGraw-Hill Book Co., 1945), pp. 283-284.

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N.L.R.B. v. *Katz*, 369 U.S. 736. Unions, on the other hand, would refrain from raising questions on which agreement might not be reached lest they be held to have "bargained away" the right to raise such issues thereafter. This would undoubtedly lessen the likelihood of good faith exploration culminating in an agreement obviating future disputes. In addition, a readiness to infer waiver would be grossly unfair to the employees whose interests in general conditions of employment the union is obliged to represent.

In sum, both parties' freedom in a legitimate area of collective bargaining is protected by the Board's ruling and the rule lessens the need to resort to economic weapons which produce interruptions in the free flow of commerce. Accord: *N.L.R.B.* v. *J. H. Allison & Co.*, *supra*, 165 F. 2d at 768.[18]

The Board's waiver doctrine also comports with the traditional concept of collective bargaining as a continuous process of which the execution of contracts is only an initial part. This concept has long been recognized by the courts. In *Aeronautical Industrial District Lodge 727* v. *Campbell*, 337 U.S. 521, 525,

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[18] There, the Sixth Circuit commented as follows:

> Nor do we see logical justification in the view that in entering into a collective bargaining agreement for a new year, even though the contract was silent upon a controverted matter, the union should be held to have waived any rights secured under the Act, including its right to have a say-so as to so-called merit increases. Such interpretation would seem to be disruptive rather than fostering in its effect upon collective bargaining, the national desideratum disclosed in the broad terms of the first section of the National Labor Relations Act.

the Supreme Court stated, "It is of the essence of collective bargaining that it is a continuous process. Neither the conditions to which it addresses itself nor the benefits to be secured by it remain static. They are not frozen even by war." And in *N.L.R.B.* v. *Newark Morning Ledger*, 120 F. 2d 262, 267 (C.A. 3), cert. denied 314 U.S. 693, the Court said:

> Collective bargaining is thus seen to be a continuing and developing process by which, as the law now recognizes, the relationship between employer and employee is to be molded and the terms and conditions of employment progressively modified along lines which are mutually satisfactory to all concerned. It is not a detailed or isolated procedure which, once reflected in a written agreement, becomes a final and permanent result."

Accord: *N.L.R.B.* v. *J. H. Allison & Co.*, *supra*, 165 F. 2d 766. Indeed, this analysis of the bargaining process was recently reaffirmed by the Supreme Court in *United Steelworkers* v. *Warrior Navigation Co.*, 363 U.S. 574. The Court observed (at 580):

> A collective bargaining agreement is an effort to erect a system of industrial self-government . . . The mature labor agreement may attempt to regulate all aspects of the complicated relationship, from the most crucial to the most minute over an extended period of time. Because of the compulsion to reach agreement and the breadth of the matters covered, as well as the need for a fairly concise and readable instrument, the product of negotiations (the written document) is, in the words of the late Dean Shulman, "a compila-

> tion of diverse provisions; some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; *and some do little more than leave problems to future consideration with an expression of hope and good faith.*" Shulman [*Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999], *supra*, at 1005 [Emphasis added.][19]

Thus, a collective agreement does not define all the obligations of the parties or contain everything upon which they have in fact agreed. Consequently, a labor agreement is not like an ordinary private commercial contract. It follows that the general rule of contract law that a party's obligation under a contract is limited to the express terms of the written instrument alone is inapplicable to labor agreements.[20]

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[19] See also, *Local 833, UAW* v. *N.L.R.B. (Kohler Co.)*, 300 F. 2d 699, 707 (C.A. D.C.), cert. denied, 370 U.S. 911.

[20] Professors Shulman and Chamberlain observed in *Cases on Labor Relations* (The Foundation Press, 1949), at p. 3, that the "heart of the collective agreement—indeed, of collective bargaining—is the process of continuous joint consideration and adjustment of plant problems. And it is this feature which indicates the great difference between the collective labor agreement and commercial contracts generally. The latter are concerned primarily with end results; the former, with continuous process." See also, Millis and Montgomery, *Organized Labor*, Vol. III of the Economics of Labor (McGraw-Hill Book Co., 1945), p. 354. Cf. Cox and Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement*, 63 Harv. L. Rev. 1097, 1100, 1119. But see *N.L.R.B.* v. *Nash-Finch Co.*, 211 F. 2d 622 (C.A. 8).

In recent years, an increasing number of enlightened representatives of both labor and management have recognized that continuous discussions are the best avenues to peaceful and intelligent resolution of the complex problems which have arisen in their respective industries. To that end, the parties have established committees in the steel, automobile, meatpacking, construction and longshore [21] industries, for

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[21] The Report of the National Labor-Management Panel to the Director of the Federal Mediation and Conciliation Service (December 30, 1964) contains the following analysis (p. 4):

> The process of exploring and solving problems before they reach crisis stage is not a new concept nor a new practice in labor-management relations. Our advancing technology with its attendant problems has, however, added new impetus to this development.
>
> The most widely publicized examples of such joint ventures are found in the major industries: the Human Relations Committee [See 45 LRRM 207-209] and Kaiser Long Range Committee in the steel industry; the Joint Study Committees in the auto and electrical manufacturing industries; the Armour Plan in the meat packing industry; the West Coast Labor Relations Committee in longshore; and the long-established joint committees in the building and construction industry.
>
> These cooperative efforts were in the main initiated by the parties themselves . . . ."

For further details as to the manner in which the mentioned plans have been implemented, see, for example, Balsley *"The Kaiser Steel-United Steelworkers of America Long Range Sharing Plan,"* Sixteenth Annual Proceeding of the Industrial Relations Research Ass'n, pp. 48-58 (1963); Killingsworth *Cooperative Approaches to Problems of Technological Change*, pp. 61-94 in *Adjusting to Technological Change* (Harper & Row, 1963); Horvitz, *"The ILWU—PMA Mechanization and Modernization Agreement: An Experiment in Industrial Relations,"* Sixteenth Annual Proceedings of the Industrial Relations Research Ass'n., pp. 22-33 (1963).

example, which meet regularly throughout the entire contract period to explore complex and controversial subjects which were not completely resolved in their earlier agreements. In this manner, the parties endeavor to solve their problems on the basis of comprehensive and thoughtful analysis rather than to reach an indecisive accord purely as a last-minute stopgap measure to avoid a threatened strike at the termination of a contract. The Board's waiver doctrine reflects and supports these aspects of industrial relations by discouraging parties from withdrawing from the bargaining process matters on which agreement has not in fact been reached.

Finally, it is noteworthy that, even apart from the fact that the policies of the Act require a strict waiver rule, the Board and court approach is in accord with the accepted principle as to waivers generally: they will not be "inferred from doubtful or equivocal acts or language." 5 *Williston on Contracts*, p. 240 (3d ed. 1961).

In light of all these considerations, we submit, the Board, as a body of "experienced officials with an adequate appreciation of the complexities of the subject," *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793, 800, has reasonably concluded that waiver of a party's right to bargain about subjects must be clearly and unmistakably proven on the record. We show below that no such showing was made here and that the Board rightly concluded that respondent violated the Act when it admittedly refused to bargain about bonus plans.

C. *The Board properly found that the Union did not waive its right to bargain with respondent concerning the promulgation of a bonus plan*

1. *The contract contains no waiver of the right to bargain*

The contract does not contain any express waiver of the Union's right to bargain about bonuses. As set forth in the Statement, Section 12(a) of the contract provides that "[t]here shall be no reduction in the present salary of any employee covered by this agreement. The term 'present salary' is understood to mean the straight time weekly salary being paid for a work week of forty (40) hours and does not include any payments for overtime or bonus or any other extra payment." (G.C. Exh. 2). Section 12(a), at most, frees the respondent of any contractual obligation to maintain bonuses throughout the contract period (R. 18-19).[22] But the express contractual language does no more; it does not specifically bind the Union thereafter to forego its statutory right to bargain with respect to the promulgation of new plans. Conversely, Section 12(a) does not expressly privilege respondent's re-

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[22] Respondent's unilateral discontinuance of the existing bonus plan in August 1963 was not the basis of the instant unfair labor practice complaint. The only issue presented here is whether respondent violated the Act by subsequently refusing to meet and confer with the Union in January and March 1964 concerning a new plan.

fusal to discuss such new proposals. Nor does it do so implicitly.[23]

First, there is no record evidence that in agreeing to incorporate Section 12(a) in their contract either party stated that the Union was thereby waiving its right to bargain about bonuses. True, this section derived from Section 12 of the Star Bulletin contract

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[23] Whether waiver is shown by pre-contract negotiations or by contract language, it must be shown clearly and unmistakably. As the Sixth Circuit stated in *Timken Roller Bearing Company* v. *N.L.R.B., supra,* 325 F. 2d 746 at 751:

> ". . . We recognize that the Union could have relinquished this right [to bargain] under the provisions of the bargaining agreement . . . But such a relinquishment must be in 'clear and unmistakable' language. *Tide Water Associated Oil Company,* 85 NLRB 1096; *N.L.R.B.* v. *Item Company,* 220 F. 2d 956, 958-959 (C.A. 5) . . . ."

See also, the opinion of Judge Clark in *N.L.R.B.* v. *Otis Elevator Co., supra,* 208 F. 2d 176, 178-179.

which the parties had stipulated in their July 13, 1962, agreement would govern the newly formed corporation until March 31, 1963. The comparable section, 26(b), of the prior Advertiser contract did not expressly exclude bonuses from the definition of "salary." But no conscious, clear and unmistakable waiver can be inferred from the contrast between the two agreements. Brandt, respondent's Assistant General Manager, testified that in the negotiations preceding the "interim agreement" the parties never discussed the differences between the two prior agreements (R. 19; Tr. 100-101, Res. Exh. 1, 3). Consequently, the record does not support the view that the parties chose the Star Bulletin contract because it contained a "waiver" provision.

Second, there is no evidence that the Union sought or received or that respondent offered any *quid pro quo* in exchange for the Union's supposed waiver. Furthermore, respondent's argument that, by excluding bonuses from the definition of "salary," the parties agreed that bonuses would be left to the unilateral determination of management is rebutted by the contract itself. In section 10(c) of the contract (G.C. Exh. 2, p. 5) the parties agreed that employees would be compensated for overtime work "at one and one half (1½) times the basic straight hourly wage." Yet overtime, like bonuses, is one of the matters excluded from the definition of "salary" in section 12 (a). It thus seems plain that such exclusion was not "clearly and unequivocally" viewed by the parties as tantamount to an agreement that matter excluded was left solely to management's determination. In

these circumstances, we submit the Union did not "clearly and unmistakably" waive its right to bargain about bonuses. See, *e.g.*, *Pacific Coast Ass'n of Pulp and Paper Mfgers.* v. *N.L.R.B.*, *supra*, 304 F. 2d at 763, 765; *General Telephone Company of Florida* v. *N.L.R.B.*, 337 F. 2d 452, 454 (C.A. 5); *N.L.R.B.* v. *Gulf Atlantic Warehouse Co.*, *supra*; *N.L.R.B.* v. *The Item Company*, *supra*; *N.L.R.B.* v. *Perkins Machine Co.*, *supra*, 326 F. 2d at 489; *N.L.R.B.* v. *Otis Elevator Company*, *supra*; see also, generally, *N.L.R.B.* v. *Lion Oil Company*, *supra*, 352 U.S. 282, 293.

2. *The Union did not "clearly and unmistakably" waive its right to bargain by its acquiescence in respondent's prior unilateral changes in bonus plans*

The Union did not waive its right to bargain about bonuses by not objecting to management's unilaterally instituted bonus plan changes. First, waiver of the right to bargain about a matter cannot be implied from acquiescence in an employer's unilateral actions since such a "waiver" is neither "clear" nor "unmistakable." Quite the contrary, it is no more than an acceptance of the substance of what management has done. Indeed, this Court has rejected an argument that waiver of the statutory right to bargain can be implied from a Union's past acquiescence. In *Pacific Coast Ass'n of Pulp & Paper Mfgers.* v. *N.L.R.B.*, *supra*, 304 F. 2d 760, 764 this Court wrote:

> The fact that, for nearly 15 years, the Unions did not insist upon [bargaining about pensions

> on an Association-wide level] does not require a finding that they had bound themselves not to do so the next time.

Accord, *General Telephone Company* v. *N.L.R.B.*, *supra*, 337 F. 2d 452, 454 (C.A. 5). In any event, the Union's failure to raise the bonus issue during negotiations preceding the 1963 contract did not constitute a waiver of its right to bargain about the subject in the future. As the record shows, when respondent discontinued an existing bonus plan on August 5, 1963, it promised that new plans would be presented soon. Similarly, when respondent discontinued existing bonus plans in June 1962, it promised that comparable bonus plans would be reinstituted thereafter. New plans were instituted in September 1962 and February 1963. Consequently, the Union's acquiescence demonstrated no more than its willingness to await respondent's presentation of new plans before deciding what steps, if any, it should take, and its satisfaction with plans presented in the past. Its failure to raise these issues in the bargaining sessions thus cannot fairly be read as an acquiescence in management's right unilaterally to fix bonuses—a right management never expressly claimed (R. 21; Tr. 104-107). Thus, the Board properly reasoned (R. 20):

> With matters in this posture, Union acquiescence with respect to respondent's course of conduct cannot, legitimately, be found sufficient to equitably estop union spokesmen from pressing its statutory right to bargain, thereafter, regarding management's formulation and promulgation of bonus plans. *General Telephone Com-*

> *pany of Florida*, 144 NLRB 311, 314-315. Management's reassurances, voluntarily proffered, regarding the presentation of new plans—while contract negotiations were pending—must, contrariwise, be considered sufficient to preclude respondent's reliance upon the union's failure to request contract negotiations on the subject as a concession that bonus plans, thereafter, would be considered within the sphere of managerial prerogative.

Furthermore, the Union did not always acquiesce in respondent's actions—or lack of them. Thus, respondent conceded in its brief to the Board that Union President Kruse "was constantly pestering the Company about incentive bonus plans" long before the 1963 negotiations (Tr. 31-33). And the record shows (*supra*, pp. 5-7) that Kruse repeatedly questioned respondent's officials about the status of the new plans it was considering and, at one point, joined other employees in the preparation of a proposed plan. In the face of these actions, and in light of respondent's repeated assurance that new plans were under study, the Union's conduct cannot fairly be interpreted as a waiver of its right to bargain about bonuses, but only as an indication that respondent's prior proposals and its promises induced the Union not to take the matter up formally in the contract negotiations.

Relying upon *Tucker Steel Corp.*, 134 NLRB 323, respondent argued to the Board that the Union was "equitably estopped" by its silence in the face of respondent's unilateral bonus changes from claiming that respondent's subsequent refusal to bargain on

that subject upon the Union's request violated the Act. There is no merit to that contention. First, *Tucker* holds to the contrary. In *Tucker*, the Board ruled that an employer's refusal to bargain upon request about a Christmas bonus violated the Act, despite the Union's prior silent acquiescence in the employer's discontinuance of the plan. Semble, *Pacific Pulp and Paper Mfrs. Ass'n* v. *N.L.R.B.*, *supra; General Telephone Company* v. *N.L.R.B.*, *supra.* True, the Board held that equitable estoppel exonerated the employer—but only from a companion charge that the unilateral discontinuance of the bonus prior to the Union's protest violated the Act. The latter holding followed because the Union had led the employer to believe that it was free to institute such changes unilaterally, and the employer could not be found to have violated the Act by acting in reliance upon the Union's conduct. But that is not this case. The propriety of respondent's unilateral changes *before* the Union invoked its right to bargain about bonuses is not at issue here.[24]

Second, it is hornbook law that the doctrine of equitable estoppel can be invoked only when the party invoking it shows that he will be prejudiced unless the other party is held bound by his silence.[25] Assuming that respondent relied upon the Union's failure to raise the bonus issue in contract negotiations, the record does not show that respondent has acted so that it will be prejudiced if it is now compelled

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[24] See n. 22, *supra.*

[25] 31 C.J.S. *Estoppel* Sec. 59 (1964).

to bargain as the Act requires. The Board's order only requires that respondent engage in good faith bargaining; it does not require that respondent accept any particular Union proposal, or, indeed, reach any agreement whatsoever. *N.L.R.B.* v. *American National Insurance Company*, 343 U.S. 395 cited with approval in *Pacific Coast Ass'n of Pulp and Paper Mfgers.* v. *N.L.R.B.*, *supra*, 304 F. 2d at 765.

Finally, respondent's premise that the doctrine of equitable estoppel by silence may be applied to prevent a union from claiming a right to bargain upon request runs counter to the decided cases holding that a valid waiver must be shown "clearly" and "unmistakably" and must have been intended. Those cases would be emptied of meaning if either party could invoke the doctrine of equitable estoppel by silence to preclude future bargaining about a subject. See cases cited *supra*, pp. 12-13.

II. The Absence of an Arbitrator's Decision Ruling that Section 12(a) of the Contract Did Not Constitute a Waiver of the Union's Right to Bargain About Bonuses Does not Bar the Board's Finding That Respondent Violated the Act

Before the Board, respondent urged that Section 12 (a) of the contract arguably constitutes a waiver of the Union's right to bargain about bonuses during the term of the agreement and that the Board lacks power to determine the validity of the defense. Respondent argued that only an arbitrator may decide that question. We anticipate that respondent will rely on this Court's recent decisions in *Square D Company* v. *N.L.R.B.*, 332 F. 2d 360, and *N.L.R.B.* v. *C & C Plywood Corp.*, 351 F. 2d 224, in support of

its argument. In these cases, the Court ruled that the Board could not adjudicate an unfair labor practice complaint because the determination whether the conduct complained of was in fact an unfair labor practice presented only a question of contract interpretation. This Court ruled in those cases that the Board was required to stay its hand pending resolution of the contract question either by an arbitrator, as in *Square D* where the contract provided for arbitration,[26] or by a court in a suit for breach of contract under Section 301 of the Labor-Management Relations Act, as in *C & C Plywood* where the contract did not provide for arbitration.[27] Under the Court's rationale, the Board's lack of jurisdiction was predicated on the fact that the existence of an unfair labor practice was "*dependent* upon the resolution of a primary dispute involving *only* the interpretation of the contract." *Square D Company* v. *N.L.R.B.*, *supra*, 332 F. 2d at 365-366 (emphasis in original). See also, *N.L.R.B.* v. *C & C Plywood Corp.*, *supra*, 351 F. 2d at 227.[28] For the reasons set out

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[26] There is no evidence that the Union sought to invoke the grievance-arbitration machinery in the instant case.

[27] Section 301(a) provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

[28] The Supreme Court has granted the Board's petition for certiorari in *C & C Plywood*, 86 Sup. Ct. 53 (April 18, 1966).

below, we respectfully request that this Court not follow its decisions in *C & C Plywood*, *supra* and *Square D*, *supra*.

Under the rationale applied in those cases, the Union would be required to test the validity of respondent's waiver defense in an arbitration proceeding before seeking a remedy before the Board. This would, in fact, deprive the Union of an opportunity to test that defense *in any forum*. See *Square D Co.* v. *N.L.R.B.*, 332 F. 2d at 362-363, 364 (Company resisted arbitration of a dispute over incentive plans because such plans were not covered by the contract and then resisted the Board's order on the ground that the issue should have been arbitrated).

There is no way that the Union can be assured that an arbitrator will decide the question whether the Union has waived its *statutory* right to *bargain* about bonuses. The contract does not afford the Union such a right. Consequently, at first glance, a grievance based on respondent's refusal to bargain about bonuses would be rejected as not arbitrable on the ground that the contract permits arbitration only "when any employee . . . or . . . the Guild believes that the employer has violated the express terms and conditions . . . [of this agreement], and that by reason of such violation his or its rights *arising out of this agreement* have been adversely affected." G.C. Exh. 2, p. 16 (emphasis supplied).[29] And a claim

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[29] The contract provides further that "the complainant in every hearing before the arbitrator shall present a prima facie case" and that "all decisions of the arbitrator shall be limited expressly to the terms and conditions of this agreement." *Id.* at p. 17.

that the contract entitles employees to bonuses would clearly be rejected on the merits and would not raise before the arbitrator the question whether the Union has a *statutory* right to *bargain* about this subject.

Moreover, even if respondent's refusal to confer about bonuses could be placed before the arbitrator on the merits, there is no assurance that the arbitrator would decide whether the Union had by contract waived its *statutory* right to bargain about bonuses. The arbitration proceeding could readily be disposed of by finding that respondent has not agreed to bargain about bonuses. Finally, even if all these obstacles to obtaining the arbitral decision could be overcome, there is no assurance that the arbitrator would decide the statutory question in the same fashion as the Board. Consequently, the upshot of requiring arbitration as a condition precedent to seeking relief from an employer's refusal to bargain where the employer presents an arguable contract defense would be either to deprive the Union of any remedy for such a violation or to run the risk of conflict between Board and arbitral decisions on the same question.

Aside from these practical considerations, we believe that the narrow view of the Board's remedial powers which this Court took in *C & C Plywood* and *Square D* is not in accord with Section 10(a) of the Act or with recent decisions of the Supreme Court. Section 10(a) of the Act provides that the Board's authority to prevent unfair labor practices "shall not be affected by any other means of adjustment or pre-

vention that has been or may be established by agreement, law, or otherwise." [30] Congress has selected the Board, a public agency acting in the public interest, as the principal instrumentality to prevent unfair labor practices and thus to remove obstructions to interstate commerce. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 264-265; *National Licorice Co.* v. *N.L.R.B.*, 309 U.S. 350, 364.[31]

Two Supreme Court cases, raising the question whether courts and arbitrators had jurisdiction to decide issues which might have been resolved in Board proceedings, lend further support to our position that the Board has power to adjudicate a dispute, even where that dispute may also be resolved

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[30] Although the contract in issue provided for arbitration, the Union did not invoke the grievance-arbitration machinery. However, even if it could have done so, this would not preclude the Board's assertion of jurisdiction to pass on the alleged violations of the Act (See, *Smith* v. *Evening News Association,* 371 U.S. 195, 197; *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 272) even though the Board might choose to defer to the award of the arbitrator provided the procedure was fair and the results not repugnant to the Act. *Spielberg Mfg. Co.,* 112 NLRB 1080-1082, and cases cited in *Carey* at 375 U.S. 269-270. In the latter cases, the Board's refusal to decide the unfair labor practice issue resulted not from its lack of *power* to do so, but because the Board, as a matter of *discretion,* concluded that the policies of the Act would best be effectuated by leaving the parties to their contract remedies.

[31] See also, *N.L.R.B.* v. *Walt Disney Productions,* 146 F. 2d 44, 48 (C.A. 9), cert. denied, 324 U.S. 877, which was apparently overruled, *sub silentio,* in *Square D* and *C & C Plywood.*

under a contract.[32] In *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, the question presented was whether a court had jurisdiction under Section 301 (a) to order arbitration of a contract dispute, since the arbitrable issue could have been resolved by the Board in representation proceedings. That question would never have arisen if the presence of a contractual dispute deprives the Board of jurisdiction to proceed. Further, the Supreme Court expressly stated (375 U.S. at 272, quoting *International Harvester Co.*, 138 NLRB 923, 925-926):

> There is no question that the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award. Section 10(a) of the Act expressly makes this plain, and the courts have uniformly so held.

The Court thereafter concluded (*id.*, at 272) that "the superior authority of the Board [vis-a-vis arbitration, etc.] may be invoked at any time."

The same question—whether the Board's authority to remedy an unfair labor practice pre-empts the jurisdiction of courts and arbitrators—arose in *Smith* v. *Evening News, Assn.*, 371 U.S. 195, where the Supreme Court held that a District Court had jurisdiction over a contract action alleging that plaintiff had been discharged on account of his union membership, a clear violation of Section 8(a)(3) of the Act. Had the case come before the Board, the em-

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[32] Accord, *Local 743, IAM* v. *United Aircraft Corp.*, 337 F. 2d 5, 10 (C.A. 2), cert. denied, 380 U.S. 908.

ployer might have argued that the discharge was permitted by the contract in suit, but that would not have deprived the Board of power to remedy the violation. As the Supreme Court wrote (371 U.S. 197):

> The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by Section 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under Section 301.

If the Court believed that the existence of an arguable contract defense would have precluded the Board from adjudicating a possible unfair labor practice, it would have decided *Smith* on that ground and would not have noted that the Board retained power to decide the case.[33]

Finally, there is no bar to the Board's assertion of jurisdiction on the principle that the Board generally does not adjudicate naked contract disputes. *N.L.R.B.* v. *Hyde*, 339 F. 2d 568, 572 (C.A. 9). In carrying out its responsibility to administer the Act, the Board must frequently interpret collective bargaining con-

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[33] In *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, in holding that a state court could adjudicate a contract claim under Section 301 of the Act, the Supreme Court noted (369 U.S. at 101, n. 9):

> It is, of course, true that conduct which is a violation of a contractual obligation may also be an unfair labor practice, and what we have said here is not to imply that enforcement of a contract obligation affects the jurisdiction of the NLRB to remedy unfair labor practices, as such.

tracts. Thus, for example, the Board has decided cases involving the legality of contract provisions under Section 8(e) of the Act; the validity of union-security clauses in cases arising under Section 8(a)(3) and (1) of the Act; and the question whether an existing contract should bar the Board from processing a representation petition and directing an election among the employees pursuant to Section 9. The Board's proceeding here was not an adjudication of a contract claim, but rather a statutory proceeding arising out of respondent's express, admitted refusal to bargain for which the contract provided no remedy. Applying the rationale of *C & C Plywood* and *Square D* to this case is entirely inconsistent with the Board's exercise of its authority in administering the cited provisions of the Act. We submit that ousting the Board of its jurisdiction in every case where respondent interposes a contract provision as an arguable defense—even where, as the Board found here, the defense was clearly without merit—would diminish the Board's authority under the Act far more than Congress intended by the enactment of Sections 203(d)[34] and 301(a) of the Labor-Management Relations Act.[35] So, too, the Supreme Court's expressed preference for arbitration over judicial resolution of labor disputes (see, for example, *Steelworkers* v.

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[34] Sec. 203(d) provides that: "[F]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

[35] See n. 27, *supra*.

Warrior & Gulf Navigation Co., 363 U.S. 574) does not foreclose the parties from pursuing Board remedies rather than those afforded under the contract. See *Carey* v. *Westinghouse, supra.*

In sum, we submit that in the face of these authorities, the reasoning of this Court's *Square D* and *C & C Plywood* decisions should be reconsidered.[36]

CONCLUSION

For the reasons stated, we respectfully submit that a decree should issue enforcing the Board's order in full.

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[36] Should the Court disagree with our contention that *NLRB* v. *C & C Plywood Corp., supra,* and *Square D Co.* v. *N.L.R.B., supra,* should not be followed here, we respectfully request that the Court await the Supreme Court's decision in *N.L.R.B.* v. *C & C Plywood* before deciding the instant case.

Certificate

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

Marcel Mallet-Prevost
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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8 (a) It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a

condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, * * *

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * *

Sec. 8 (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

* * * *

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such agreement shall be to such extent unenforcible and void: * * *

* * * *

REPRESENTATIVES AND ELECTIONS

Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such

purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the

service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon.

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary re-

lief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

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